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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 10-14419 (SCC)

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In the Matter of:

BOSTON GENERATING, LLC, et al.

Debtors.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

September 22, 2010
11:25 AM

B E F O R E:
HON. SHELLY C. CHAPMAN
U.S. BANKRUPTCY JUDGE

HEARING re Motion of the Debtors for Interim and Final Orders

(I) Authorizing Debtors to (A)Continue Their Workers'

Compensation, Liability, Property and Other Insurance Programs,

(B)Pay All Prepetition Obligations in Respect Thereof and

(C)Continue Grant of Security Interest to an Insurance Premium

Finance Company and (II) Directing Financial Institutions to

Honor and Process Checks and Transfers Related to Such

Obligations

HEARING re Motion of the Debtors for Entry of Interim and Final

Orders Pursuant to Sections 105(a) and 363(b) of the Bankruptcy

Code Authorizing Debtors to Pay Prepetition Taxes

HEARING re Motion of the Debtors for Interim and Final Orders

(I) Authorizing, but not Directing, the Debtors to (A)Pay

Prepetition Employee Obligations; and (B)Continue Employee

Benefit Plans and Programs Post-Petition; and (II)Authorizing

the Debtors to Pay Withholding and Payroll-Related Taxes; and

(III) Directing All Banks to Honor Pre-Petition Checks and

Transfers For Payment of Employee Obligations

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HEARING re Motion of the Debtors for Entry of Interim and Final
Orders Pursuant to Sections 105(a), 363(b), 364, 503(b)(9) and
507(a)(2) of the Bankruptcy Code Authorizing the Debtors to Pay
Prepetition Claims of Certain Essential Vendors

HEARING re Motion of the Debtors for Entry of Interim and Final
Orders Pursuant to Sections 105(a) and 363(b) of the Bankruptcy
Code Authorizing Payment of Certain Prepetition Warehousing
Charges, Lien Claims, and Maintenance Charges in the Ordinary
Course of Business

HEARING re Motion of the Debtors for Entry of an Order Pursuant
to Sections 105(a), 327, and 330 of the Bankruptcy Code
Authorizing the Debtors to Employ Professionals Utilized in the
Ordinary Course of Business Nunc Pro Tunc to the Petition Date

HEARING re Motion of the Debtors for an Order Pursuant to
Sections 105(a) and 331 of the Bankruptcy Code Establishing
Procedures for Interim Monthly Compensation and Reimbursement
of Expenses of Professionals and Members of Official Committees

HEARING re Motion of the Debtors for Order Establishing
Deadlines for Filing Proofs of Claim and Approving the Form and
Manner of Notice Thereof

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HEARING re Motion of the Debtors for Entry of an Order
Establishing Procedures for Settling Terminated Safe Harbor
Contracts

HEARING re First Omnibus Motion of the Debtors for Entry of
Order Authorizing the Debtors to Reject Certain Executory
Contracts Nunc Pro Tunc to Their Respective Notice Dates

HEARING re Motion of the Debtors for Entry of Interim and Final
Orders Providing Certain Protections in Connection With, and
Authorizing the Assumption of, Executory Contracts with
Distrigas of Massachusetts LLC and GDF SUEZ Energy North
America, Inc.

HEARING re Motion of the Debtors for Entry of an Order
Providing Certain Protections in Connection with, and
Authorizing the Assumption of, Executory Contracts with Sequent
Energy Management, L.P.

HEARING re Motion of the Debtors for Entry of an Order
Providing Certain Protections in Connection with, and
Authorizing the Assumption of, Executory Contracts with Credit
Suisse Energy LLC and Credit Suisse (USA), Inc.

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2 HEARING re Motion of the Debtors for Entry of an Order
3 Authorizing the Assumption of Executory Contracts with Sempra
4 Energy Trading LLC

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6 HEARING re Emergency Motion of CarVal Investors, LLC and
7 Fortress Investment Group LLC to Adjourn Hearing on the Motion
8 of the Debtors for Entry of (I) An Order Approving and
9 Authorizing (A) Bidding Procedures in Connection with the Sale
10 of Substantially all of the Assets of the Debtors, (B) Stalking
11 Horse Bid Protections, (C) Procedures for the Assumption and
12 Assignment of Executory Contracts and Unexpired Leases in
13 Connection With the Sale of Substantially all of the Assets of
14 the Debtors, (D) the Form and Manner of Notice of the Sale
15 Hearing; and (E) Related Relief; and (II) an Order Approving and
16 Authorizing (A) the Sale of Substantially All of the Assets of
17 the Debtors Free and Clear of Claims, Liens, Liabilities,
18 Rights, Interests and Encumbrances, (B) the Debtors to Enter
19 Into and Perform Their Obligations Under the Asset Purchase
20 Agreement, (C) the Debtors to Assume and Assign Certain
21 Executory Contracts and Unexpired Leases, (D) the Transition
22 Services Agreement; and (E) Related Relief

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25 Transcribed by: Lisa Bar-Leib

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Please be seated. I
3 apologize for the delay. The calendar this morning ran a
4 little late.

5 MR. BAKER: Good morning, Your Honor. Jan Baker for
6 the debtors along with Adrienne Wheatley and Caroline Reckler.
7 Your Honor, I'm pleased to say that, with one exception, all of
8 the matters that were set for today have been resolved as a
9 result of the diligence of Ms. Reckler, Ms. Wheatley and the
10 cooperation of the various parties. We do not have resolution
11 yet on the discovery motion and the request to adjourn. So
12 what I'd like to suggest is that, first, Ms. Reckler go through
13 quickly the final orders, Ms. Wheatley cover the matters that
14 were contested dealing with the assumptions since she did all
15 the work preparing for the --

16 THE COURT: Okay.

17 MR. BAKER: -- litigation. And then we'll take up the
18 motion to adjourn.

19 THE COURT: All right. Before -- that sounds like an
20 excellent plan. Before we get started, let me take the
21 appearances of folks on the phone.

22 MR. TAYLOR (TELEPHONICALLY): Joshua Taylor on behalf
23 of Mitsubishi Power Systems Americas, Inc.

24 THE COURT: All right. Thank you, Mr. Taylor.

25 MR. LAWALL: Frank Lawall, Pepper Hamilton, on behalf

1 of ExxonMobil.

2 THE COURT: All right. Thank you. Ms. Barr, are you
3 on the phone? Okay. Ms. Reckler?

4 MS. RECKLER: Good morning, Your Honor. Caroline
5 Reckler on behalf of the debtors. Your Honor, we filed a
6 notice of amended agenda late last night reflecting that the
7 Algonquin matters were no longer contested. And I can walk
8 through the matters that we do have on the agenda and answer
9 any questions that Your Honor may have.

10 THE COURT: All right. So I'm on the agenda that you
11 filed -- it's doc number .1? The footer?

12 MS. RECKLER: That's correct, Your Honor.

13 THE COURT: Okay.

14 MS. RECKLER: Your Honor, the first item on the agenda
15 is the debtors' insurance motion. Your Honor granted an
16 interim order at the first day hearing and there were very few,
17 if any, changes to the form of order. And I believe we
18 submitted a form of blackline showing the nonsubstantive
19 changes this morning. I'm happy to answer any questions that
20 Your Honor has. And I will note that there were no objections
21 received for this motion.

22 THE COURT: All right. And this has been reviewed
23 with Mr. Smith?

24 MS. RECKLER: Yes, Your Honor. And we --

25 MR. BAKER: He has this one.

1 MS. RECKLER: We did provide him information he
2 requested specifically with respect to this motion.

3 THE COURT: All right. All right. The motion's
4 granted.

5 MS. RECKLER: Would Your Honor -- I have the form of
6 orders. Would you like me to hand them all up at the end?

7 THE COURT: We can -- why don't you wait till the end
8 and we can take them all at the end.

9 MS. RECKLER: Your Honor, the second item on the
10 agenda is the debtors' motion to pay pre-petition taxes.
11 Again, this was a motion that was granted on an interim basis
12 at the first day hearing. We've been through this with the
13 committee as well and there were no comments received.

14 THE COURT: All right. That motion's approved.

15 MS. RECKLER: The third item on the agenda, Your
16 Honor, is the debtors' wage -- what we call the wage motion.
17 We did make some changes to incorporate comments from the
18 committee on this motion. Specifically, we clarified for the
19 avoidance of any last doubt that the debtors will not make
20 nonordinary course payments to insider or employees of the
21 nondebtor affiliates. And that language has been approved by
22 Mr. Smith and his colleagues and built into the order.

23 THE COURT: All right. That motion's approved as
24 well.

25 MS. RECKLER: Thank you, Your Honor. The fourth item

1 on the agenda, Your Honor, is the debtors' critical vendor
2 motion. We have incorporated Your Honor's comments from the
3 interim hearing into the form of order for the final hearing.

4 THE COURT: Okay.

5 MS. RECKLER: And we did not receive any further
6 comments from any other party in interest.

7 THE COURT: All right. And so, with respect to that,
8 we're clear that Distrigas is not being paid under that --

9 MS. RECKLER: That's correct --

10 THE COURT: -- order.

11 MS. RECKLER: -- Your Honor. Crystal clear.

12 THE COURT: Okay. All right. That motion's approved.

13 MS. RECKLER: Thank you, Your Honor. Your Honor, item
14 number 5 is the debtors' warehousing motion. Again, we haven't
15 received any comments from the committee or otherwise on this
16 motion. And we have not made any substantive changes to the
17 form of order.

18 THE COURT: All right. That motion's approved, the
19 final, as well.

20 MS. RECKLER: Thank you, Your Honor. Item number 6 on
21 the agenda, Your Honor, is the debtors' motion to employ
22 professionals in the ordinary course of business. These are
23 professionals who will not be working on the debtors'
24 restructuring efforts but provide services in the general
25 operation of the debtors' businesses. And we have proposed a

1 cap in consultation with the United States trustee. And I
2 believe he's comfortable with the form of order as well.

3 THE COURT: Okay. That one's approved.

4 MS. RECKLER: Thank you. Your Honor, the next item or
5 motion on the agenda is the debtors' motion to establish
6 interim monthly compensation procedures for the professionals,
7 the debtor professionals, and the committee professionals. I
8 understand that we'll be taking up the retentions, at least of
9 the debtors' professionals, on Monday. But we thought it made
10 sense to proceed with interim compensation procedures at this
11 juncture.

12 THE COURT: All right. And there are no objections to
13 that?

14 MS. RECKLER: No, Your Honor.

15 THE COURT: All right. So we'll enter that order.
16 Are the professional retentions going to be contested in any
17 meaningful way on Monday?

18 MS. RECKLER: Your Honor, we have not received any
19 objections. Other than with respect to the United States
20 trustee who we continue to discuss some of the retentions with,
21 we haven't received any objections. And the objection deadline
22 has passed for everyone other than the United States trustee
23 and the committee. We continue to talk to the United States
24 trustee and it's my hope that we will work out or resolve any
25 questions and concerns in advance of the hearing. Or, if

1 necessary, we may even discuss continuing those --

2 THE COURT: Okay.

3 MS. RECKLER: -- that we cannot resolve.

4 THE COURT: All right. Just keep us informed in that
5 regard. Okay? So that brings us up to the bar date motion?

6 MS. RECKLER: Yes, Your Honor. I understand it's
7 early in these cases. But if Your Honor approves the sale in
8 mid-December -- or mid-November, early December, we're hoping
9 that thereafter we'll be able to quickly move forward with a
10 liquidating plan. And so we've asked Your Honor to set a bar
11 date which is triggered to our -- the date on which we file our
12 schedules and statements just so that we take advantage of the
13 time we have now and give the creditors ample notice of the bar
14 date.

15 THE COURT: All right. Then let me ask Mr. Smith
16 specifically about this one. Is this -- this is acceptable to
17 you?

18 MR. SMITH: Yes, it is, Your Honor. We did -- we
19 weren't so much concerned with it and yet, given the speed of
20 the case, we felt it might be a good idea to have a real good
21 idea who was leading here --

22 THE COURT: Okay.

23 MR. SMITH: -- so we have some idea of the numbers
24 assuming that that becomes relevant --

25 THE COURT: All right. I share your observation. So

1 on that basis, I'll approve this.

2 MS. RECKLER: Thank you, Your Honor. Your Honor, the
3 next item is a motion to establish procedures to settle
4 terminated safe harbor contracts. And I recognize that at the
5 time we filed this motion, which is customary for cases of this
6 nature, we were faced with the potential of having a greater
7 number of terminated contracts. If Your Honor approves the
8 four contracts that are up for assumption today, we may really
9 only have one contract that would be subject to these
10 provisions. We think the motion will streamline the notice
11 procedures but at the same time still afford parties-in-
12 interest notice and proper protections of their rights to the
13 extent they object instead of going through the 9019 settlement
14 procedure.

15 THE COURT: All right. All right. And again, I'm
16 going to ask Mr. Smith about this one because, as I understand
17 it under the procedures, it's primarily the agents who get the
18 most visibility into what the termination payment would be.

19 MS. RECKLER: That is correct although the creditors'
20 committee certainly is afforded notice and an opportunity to
21 object.

22 THE COURT: All right. So you're good, Mr. Smith?

23 MR. SMITH: I am.

24 THE COURT: All right. Okay. That's approved.

25 MS. RECKLER: Thank you, Your Honor. Your Honor, I

1 believe that brings us to the debtors' motion to reject certain
2 executory contracts. We have broken the order into two parts.
3 The first part deals with Sprague and the debtors are seeking
4 to reject the terminalling contract with Sprague. The debtors
5 believe that it is in their best business judgment to reject
6 the contract at this juncture so that they do not continue to
7 incur the administrative expenses that they would be required
8 to pay going forward for services that they do not require.

9 THE COURT: All right. And there was no objection
10 filed, correct?

11 MS. RECKLER: No. There was no object. With respect
12 to the Algonquin contract --

13 THE COURT: Yes.

14 MS. RECKLER: -- that was also the subject of this
15 motion, we have worked out a stipulation with Algonquin and
16 presented that to chambers to essentially wait until the
17 district court rules on the portion of the motion that would
18 withdraw the reference with respect to Algonquin.

19 THE COURT: Right.

20 MS. RECKLER: -- and then, if appropriate, would come
21 back to Your Honor.

22 THE COURT: Right. Now there's also -- there's a
23 second motion to withdraw the reference, is there not?

24 MS. RECKLER: That is correct. That is with respect
25 to the sale motion --

1 THE COURT: Sale.

2 MS. RECKLER: -- but not the bidding. The papers were
3 clear on their face that it was not with respect to the bidding
4 procedures --

5 THE COURT: Right.

6 MS. RECKLER: -- just the ultimate sale.

7 THE COURT: Okay. All right. So we have a
8 stipulation in the form that the parties want me to approve?

9 MS. RECKLER: Yes. And it's been executed by both of
10 the parties.

11 THE COURT: All right. I'm seeing someone else
12 nodding in the background.

13 MR. YOUNG: Bennett Young for Algonquin.

14 THE COURT: All right.

15 MR. YOUNG: That's correct, Your Honor.

16 THE COURT: Okay. All right. We'll enter the
17 stipulation later today. And also do we have -- you'll give us
18 an appropriate order with respect to the rejection of the
19 Sprague?

20 MS. RECKLER: That's correct, Your Honor.

21 THE COURT: Okay. Very well.

22 MS. RECKLER: Your Honor, if I may, I will turn over
23 the podium to Ms. --

24 THE COURT: Ms. Wheatley?

25 MS. RECKLER: -- Wheatley for the remainder of the

1 uncontested matters going forward.

2 THE COURT: All right. Thank you, Ms. Reckler.

3 MS. RECKLER: Thank you.

4 MS. WHEATLEY: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MS. WHEATLEY: Adrienne Eason Wheatley for the
7 debtors. The next four items on the agenda relate to
8 assumption of certain contracts. I thought we could just take
9 them together. Item 11 is for assumption of the Distrigas
10 contract. There are no objections. Item number 12 is for
11 assumption of the Sequent contracts. There are no objections.
12 The debtors did receive informal comments in the form of an
13 order from Sequent Energy Management and that has been provided
14 to chambers.

15 The next motion is number 13. That's the assumption
16 motion for Credit Suisse. And the last one is number 14 on the
17 agenda, the assumption motion for Semptra Energy.

18 Those motions were contested until late yesterday
19 afternoon at which point Algonquin withdrew its opposition and
20 its objection in its entirety as to all four contracts.
21 Therefore, these motions are uncontested and we request entry
22 of a final order from Your Honor.

23 THE COURT: All right. Does anyone wish to be heard
24 with respect to the assumption of these four contracts? All
25 right. There being no response, I'll enter those orders.

1 MS. WHEATLEY: Thank you, Your Honor.

2 THE COURT: Thank you, Ms. Wheatley. And I appreciate
3 your working out the objection.

4 MS. WHEATLEY: Thank you.

5 THE COURT: Okay. That was the easy part. Before we
6 get to the CarVal and Fortress matters, let me pause to talk
7 about the final form of the cash collateral order which we
8 received, I believe, late yesterday. I've gone through the
9 order and checked it against my recollection of the issues that
10 were raised. And I just want to ask if everyone is satisfied
11 that it accurately reflects everybody's needs and concerns and
12 the resolutions that we reached at the last hearing. Ms.
13 Reckler?

14 MS. RECKLER: Your Honor, I did receive by e-mail from
15 Algonquin, counsel to the second lien agent and counsel to the
16 first lien agent that they were all satisfied with the form of
17 the order.

18 THE COURT: All right. Then we'll enter that later
19 today. And thank you for working together to resolve that.

20 Okay. So I think that brings us to the emergency
21 motion.

22 MR. LAWALL (TELEPHONICALLY): Your Honor, excuse me.
23 This is Francis Lawall from ExxonMobil. On the cash collateral
24 order, I have not seen the file form. But the assumption is
25 that the stipulation that was placed on the record with respect

1 to Exxon's pre-petition possessory being for the warehousing.
2 While not expressly being put into the order, it is made part
3 of it as a result of the stipulation on the record yesterday.

4 THE COURT: Yes. Absolutely correct.

5 MR. LAWALL: Thank you, Your Honor.

6 THE COURT: Okay.

7 MR. LEBLANC: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. LEBLANC: Andrew Leblanc of Milbank, Tweed, Hadley
10 & McCloy representing CarVal and Fortress in this matter, Your
11 Honor. And, Your Honor, just as a procedural matter, we -- I
12 filed a pro hac vice motion. I've appeared many times in this
13 actual courtroom back in front of Judge Drain, of course. But
14 it hasn't been acted on but I'd ask the Court's indulgence for
15 me to be heard today.

16 THE COURT: All right. Yes. Welcome.

17 MR. LEBLANC: Appreciate that.

18 THE COURT: Before we get started, we have to talk
19 about your 2019.

20 MR. LEBLANC: Yes. I'm happy to, Your Honor. I
21 think -- Your Honor, to be clear about our 2019, we are not a
22 committee. We're not a group. We're not a coalition. We're
23 not a consortium. We're not any of the fancy words people
24 affix to try to be something other than a committee or an
25 entity covered under 2019. Milbank Tweed represents two

1 individual creditors in this matter. We are the only entity
2 that is representing more than one matter -- more than one
3 entity. We're not acting on behalf of anyone other than those
4 two creditors. So this is not the typical situation of an ad
5 hoc group or an ad hoc committee or something like that where
6 the membership is in flux or there's changes or might purport
7 to represent other people's interests. We are -- we, Milbank,
8 represent two creditors. If we represented one, nobody would
9 have any issue with a 2019 at all. And so, we submitted what
10 we believe the rule requires which is a 2019 on behalf of the
11 entity, Milbank Tweed, indicating what is required under the
12 rules, that the entity that represents more than one creditor
13 holds no interest -- holds no claims against this estate.

14 So we think we've complied with Rule 2019 with the
15 possible exception, Your Honor, of not having submitted our
16 engagement letters with our clients. And I'm not sure that
17 that's really -- I can't think of a situation where that's what
18 is really intended under 2019. So it's not a situation where
19 we would be disclosing -- because the rules are quite clear as
20 to who needs to disclose holdings information and dates of
21 purchase and things like that. And that is the entity. And
22 we, the entity, Milbank Tweed, representing multiple clients
23 have not -- do not have any claims against this estate.

24 THE COURT: All right. Mr. Baker, what do you think
25 about that?

1 MR. BAKER: Well, Your Honor, as the Court's aware,
2 there's a lot of ferment particularly in this district over
3 that particular issue. I respectfully disagree with Mr.
4 Leblanc that that complies with what I had understood to be the
5 requirements in this district. I don't think any of the judges
6 have specifically parsed through whether it's if you only
7 represent two then you disclose only as to your law firm
8 before. But I think my sense of where the law in the southern
9 district is headed is for a more expansive disclosure and
10 compliance with the rule than has been proposed.

11 THE COURT: Well, you know, as I'm sure most of you in
12 the courtroom know and as Mr. Baker indicated, there's been a
13 lot of debate about 2019. And there's not a lot of agreement
14 here, in Delaware, and there's a new rule that's about to come
15 out. But I'm just looking simplistically at the simple words.
16 And I agree that the word "committee" does not appear and
17 you're not holding yourself out as a committee. I get that.

18 MR. LEBLANC: Right. And --

19 THE COURT: You're Milbank Tweed representing two
20 creditors. But if you read the rule, it says "Every entity",
21 and that's what Milbank Tweed is here, "representing more than
22 one creditor", which you're doing, "and unless otherwise
23 directed, shall file a verified statement setting forth the
24 name and address of the creditor." You did that. "(2) the
25 nature and amount of the claim or interest and the time of

1 acquisition thereof unless it is alleged to have been acquired
2 more than one year prior to the filing."

3 MR. LEBLANC: Your Honor, and I think what you need --
4 what we need to do is then look at what (4) says because I
5 think what is intended in (2) is modified by (4) -- not
6 modified by (4) but there's additional information that is
7 required to be provided in (4). And (4) says "with reference
8 to the time of employment of the entity, the organization or
9 formation of the committee or the appearance in the case of any
10 indenture trustee, the amounts of claims or interests owned by
11 the entity" and then it goes on from there. The entity, again,
12 is Milbank Tweed. We think -- and, Your Honor, I'm not trying
13 to hide the ball here. I'll tell the Court exactly to the best
14 of my knowledge in approximate numbers what CarVal and Fortress
15 hold collectively. And I'm happy to do that. And the answer
16 to that is we hold -- those two entities hold approximately
17 thirty percent of the first lien debt. They are not consenting
18 holders in the words that it's been used in these pleadings.
19 They've not signed the sale support agreement. But they hold
20 approximately thirty percent of the first lien debt. In
21 addition to that, they hold approximately forty percent of the
22 second lien debt. And they also hold positions in the
23 mezzanine debt. And I apologize. I can't give the Court --
24 it's a substantial amount in the mezzanine debt as well. I
25 can't give the Court the exact numbers. But I think it's

1 grossly misleading. And I appreciate -- we filed our pleadings
2 saying we hold first lien debt. But Latham's response or the
3 debtors' response to it said that we're just out of the money
4 second lienholders. It's actually not true.

5 THE COURT: Well, but that's exactly -- I mean, that's
6 exactly --

7 MR. LEBLANC: Right.

8 THE COURT: -- why I'm asking the question because --
9 and you don't have to come to a definitive resolution on the
10 cosmic issue of 2019. You've now made a significant disclosure
11 that greatly moves you towards my view of what's required under
12 2019. It's quite a different thing to know that you're
13 representing thirty percent of the first lien and forty percent
14 of the second lien than somebody who brought a couple of pieces
15 of paper --

16 MR. LEBLANC: Understood.

17 THE COURT: -- the other day. And that's a
18 significant fact, I think, for everybody to know as we head
19 into the next important -- critical juncture in this case. So
20 I appreciate your willingness to make that disclosure. I'm not
21 interested in what you paid for it because my personal view --
22 that's not relevant to what's going to happen next. But I
23 think knowing that you have the substantial positions that
24 you've just identified is exactly what I want to know so that I
25 can evaluate --

1 MR. LEBLANC: Right.

2 THE COURT: -- the positions that are taken. So --

3 MR. LEBLANC: Understood. And, Your Honor, I would
4 have made that disclosure even if I was representing one
5 client. We don't intend to hide the ball on that. And
6 clearly, nobody could argue 2019 would apply if we represented
7 only CarVal --

8 THE COURT: Abso -- well, that's --

9 MR. LEBLANC: -- or Fortress.

10 THE COURT: You know, we could have a very interesting
11 discussion sometime over that loophole in 2019, but that's
12 not --

13 MR. LEBLANC: And we're certainly not trying to take
14 advantage of a loophole. It's just we represent ad hoc groups
15 all the time and ad hoc committees. And we struggle with these
16 issues when --

17 THE COURT: Right.

18 MR. LEBLANC: -- you identify and you seek to
19 represent a group as opposed to individual creditors in the
20 case. So we didn't -- I don't think we struggled with the
21 question. And we think it's quite clear that we complied with
22 the required disclosures. But we weren't trying to hide the
23 ball that we are -- the two entities that we represent are some
24 of the most significant stakeholders in this case including
25 with respect to the first lien debt. And again, they're not

1 parties to the sale support agreement. They are not consenting
2 lenders. So when they tell you that they have over fifty
3 percent, you know that at least thirty percent of that is not
4 part of the consenting holders' group.

5 THE COURT: Okay. All right. Well, based on your
6 additional disclosures, I'm going to put the 2019 issue to the
7 side.

8 MR. LEBLANC: Okay.

9 THE COURT: And let's move on.

10 MR. LEBLANC: Your Honor, we have been -- and now I'm
11 referring to the entity of the 2019 --

12 THE COURT: Okay.

13 MR. LEBLANC: -- language. We've been involved in the
14 case since it began. But we've been representing these two
15 creditors with -- who have very significant interest in this.
16 And our focus has been on the process that's happening now and
17 the sale procedure that's being proposed to be approved on
18 Monday. And the process for us began immediately upon the
19 filing of the case. We served document requests related to
20 that motion the Friday after this case was filed on Monday. On
21 the 23rd of August, we served document requests that refer
22 specifically to this motion. Now we have not taken meaningful
23 part of -- taken meaningful part in any of the other things
24 that are going on. Other people are handling those things.
25 The second lien agent obviously has an interest in it The

1 first lien agent -- but we're -- our focus has been on this
2 sale process. And we've been trying from the day the case was
3 filed to get as much information as we could to understand why
4 it was being done and to mount a reasonable objection to it
5 because we think it is objectionable. And so we began our
6 process on August 23rd. We served document requests. We
7 negotiated with the debtor for a period of time. They served
8 document -- I'm sorry -- responses to those requests on
9 September 3rd when the document requests were returnable. And
10 they objected to any number of things. It's the laundry list
11 of objections that one would typically expect to see. But what
12 they said with respect to every item is we will produce these
13 documents subject to the objections that are asserted herein.
14 They raised every objection, Your Honor, even to the point of
15 objecting that we requested that they make the production in
16 Washington, D.C. where I live. They objected because that's
17 inconsistent with Rule 34.

18 But what they didn't object to, Your Honor, was that
19 there was no contested matter. They never said, under 9014,
20 there needs to be an objection before it's considered a
21 contested matter or make applicable 7026 and 7034 because,
22 frankly, notwithstanding what was said to us in an e-mail two
23 days ago, that really isn't the law in this circuit. In fact,
24 I think it's quite clearly to the contrary. It's just across
25 the hall -- across the atrium here in front of Judge Gerber.

1 His standard case management order resolves any ambiguity about
2 that because he says every motion is a contested matter whether
3 an objection has been filed or not.

4 And in fact, while it's very influential to see -- I'm
5 sorry, Your Honor.

6 THE COURT: You don't have to spend a lot of time on
7 the point.

8 MR. LEBLANC: Okay. Thank you, Your Honor. And I'll
9 move on. The first line of the debtors' response to our motion
10 is that our motion to adjourn is moot. Your Honor, it's hardly
11 moot. What the debtors then disclose is that over the last
12 approximately thirty days, they've had thirty lawyers pouring
13 over twenty million pages of documents and they began making
14 production to us yesterday of those documents.

15 Now, I want to be fair. I don't want to be accused of
16 misrepresenting anything. They did produce to us four
17 documents on Friday at 4:00, the 17th of September. Those four
18 documents consisted of the confidential information memorandum
19 that was sent to debtors in May, of a letter that was sent to
20 debtors in May, of a second letter that was sent to debtors in
21 May. And I believe, if my recollection serves me, of another
22 version of documents -- confidential information type
23 presentation made to bidders in a May or June time frame. So
24 approximately 156 pages were produced to us on September 17th
25 twenty-six days after we served our discovery requests,

1 fourteen days after, to the day, that responses were due to it.

2 And importantly, Your Honor, four days -- five days
3 after they told us they would begin a rolling production of
4 electronic documents. They told us they would begin a rolling
5 production of electronic documents on September 13th. And only
6 on that day did they then say well, you haven't objected, so
7 you're not getting documents.

8 So we began getting documents yesterday. Out of the
9 apparently twenty million pages that they have reviewed, we
10 have received so far, as of the last tally when I walked over
11 to court, 13,333 pages of documents. So apparently, over the
12 next twenty-four hours, we are at risk of getting 19,986,667
13 pages of documents. And depositions are expected under their
14 proposed schedule to start on Friday and conclude on Sunday for
15 an objection on Monday.

16 Our objection, of course, is due this afternoon at
17 4:00 pursuant to the Court's schedule. Now, in addition to
18 that, yesterday, the debtors served on us at 7:15 p.m. fourteen
19 document requests propounded on us returnable tomorrow
20 afternoon at 4:00. So what the debtors would have us receive
21 whatever amount of documents they're going to produce to us
22 over the next twenty-four hours, prepare for depositions,
23 respond to fourteen document requests, serve an objection,
24 prepare for an objection hearing, and then come in on Monday
25 and decide what is probably the most important thing to happen

1 in this case: whether or not there's going to be a 363 sale
2 and, importantly, in that 363 sale, whether or not we're going
3 to sign away thirty-five million dollars of the estate's assets
4 in bidder protections all on four or five days' notice. Now,
5 Your Honor, although we haven't been involved, we consciously
6 chose not to come in and burden the Court with our own views on
7 cash collateral and things like that. We know that this is not
8 the first time that this has happened with these debtors. They
9 apparently, modus operandi, appears to be wait until the last
10 minute, dump documents on people so they don't have time
11 meaningfully to object. Now when you're dealing with cash
12 collateral issues about how people are going to get paid,
13 whether vendors are going to get paid, and truly whether the
14 lights stay on in Boston, maybe, and particularly when you're
15 dealing with cash collateral which has some effect on creditor
16 recoveries but is not the sign for non of the case. Maybe
17 under those circumstances, you can jam people on discovery.
18 But when you're dealing with what is probably the single most
19 important thing to happen in this case, we just think it's
20 patently unfair and a violation of due process. To force us to
21 try to respond and to deal with these issues in four or five
22 days, two of which, of course, are a weekend -- now, we suggest
23 -- and we suggest it in our motion, because at the time we
24 filed it, we hadn't received any meaningful production other
25 than the 156 pages that I referred to earlier. We suggested

1 just an adjournment until such time -- we can't predict when
2 the debtors' production will be done. We can't predict how
3 many of the 19,866,000 -- 986,000 plus documents --

4 THE COURT: You can round.

5 MR. LEBLANC: -- the twenty million documents left to
6 come to us, we can't predict how long it's going to take for
7 the debtors to produce it. And if it's millions and millions
8 of pages, we can't predict how long we're going to need to go
9 through it. They took thirty days with thirty lawyers working
10 presumably around the clock to review it. We should have some
11 meaningful amount of time to review it, prepare for the
12 objection and be able to come in and give Your Honor what I
13 think Your Honor deserves both in our pleadings and in our oral
14 presentation a meaningful response to a significant motion in a
15 very large case. And particularly, an objection coming from
16 significant creditors and stakeholders in this case who have
17 very, very different views about what should happen here.

18 THE COURT: All right.

19 MR. LEBLANC: Now, the debtors say that there's
20 prejudice because there is a deadline -- there are deadlines in
21 their asset purchase agreement.

22 THE COURT: Yeah. The deadlines are forty-five days
23 from the petition date for the bid procedures. The bid
24 procedures order to be entered except by reason of the Court's
25 schedule to --

1 MR. LEBLANC: Right.

2 THE COURT: -- summarize what the provision says.

3 MR. LEBLANC: Yes. And so, by our count, Your Honor -
4 - and someone could obviously correct us by a day or two, but
5 by our count, that's next weekend, the 2nd or 3rd of the month.
6 So --

7 THE COURT: It is. And under the interpretation
8 provisions of the document, that puts us out to October 4th.

9 MR. LEBLANC: Right. And so, there isn't any
10 prejudice if it can be heard by October 4th.

11 But, Your Honor, I, frankly, think there's a bigger
12 point here. If these debtors are really going to tell the
13 Court that Constellation is going to walk from this deal before
14 the Court has approved its bid protections because the debtors
15 miss an interim deadline -- it doesn't require pushing out of
16 the absolute deadline. But because the debtors miss an interim
17 deadline then I think the Court has to really think about
18 whether it's going to approve a thirty-five million dollar
19 payment. If they're going to walk before that payment is
20 approved because of a foot fault and because the debtors are
21 required to give due process to the parties-in-interest in this
22 case then I don't know why we would approve -- why the Court
23 would approve any bid protection for them. If they're looking
24 to walk, let them walk before they have thirty-five million
25 dollars in their pocket, if they do. Because if that's

1 approved, if the Court approves the bid protections of thirty-
2 five million dollars and there's a foot fault after, we know
3 what the debtor's going to say. Don't make us miss this
4 deadline 'cause then they'll get thirty-five million dollars.
5 You don't have that -- we don't have that, Your Honor, hanging
6 over our head.

7 So I think, Your Honor, claims of prejudice really
8 should fall on deaf years. And the debtors even admit that
9 they have cash sufficient to run into the first quarter of
10 2011. And I think there's even a finer point to be made to
11 that.

12 At the end of the projection period in the cash
13 collateral order, Your Honor, the debtors have 16.7 million
14 dollars. That's in March of 2011.

15 THE COURT: 2011, right.

16 MR. LEBLANC: But it's important to remember, Your
17 Honor, when they have 16 --

18 THE COURT: That's after fees.

19 MR. LEBLANC: Well, that's after fees. But it's also
20 when they're not doing anything. They're not producing power
21 for the city of Boston. So if they only had ten million
22 dollars to liquidate this estate, we may not have to have as
23 many lawyers on pleadings but it's going to get done for ten
24 million dollars, or even five million dollars. At that point,
25 they're not operating a business. And so, the only cash

1 projections that they've provided, show 16.7 million dollars at
2 the end of Q3 -- I'm sorry -- Q1 '011. And I just don't think
3 that that could fairly serve as a basis for prejudice.

4 Your Honor, I think that the minimum, bare minimum due
5 process requirements here require the Court to adjourn this
6 hearing and allow the debtors -- we've not moved to compel,
7 Your Honor, because the debtors told us they were producing
8 documents. They haven't done so. We think they're going to do
9 so. They now committed to do so. But we need to get those
10 documents. And we need to have an opportunity to provide the
11 Court with what it needs which is a meaningful objection that
12 responds to the issues and deals with what are very, very heavy
13 issues, whether a debtor should be permitted to sell itself --
14 sell substantially all of its assets in a 363 instead of
15 through a Chapter 11. That's a significant issue. And I think
16 the Court needs to know why that's being done.

17 And so, Your Honor, I'll rest unless the Court has any
18 questions. Due process here requires, we think, an adjournment
19 of this hearing until such time as we can adequately prepare
20 for it. And we have been anything but dilatory in our efforts.
21 We began this process immediately. We have no ulterior motive
22 other than to prepare ourselves for what we view as the most
23 significant event in this case. So unless the Court has any
24 questions, I would appreciate an opportunity to respond --

25 THE COURT: Yes. Let me hear from some of the other

1 parties. Thank you, Mr. Leblanc.

2 MR. LEBLANC: Thank you, Your Honor.

3 THE COURT: All right. Mr. Baker, do you want to go
4 next? I also want to hear from Wachtell and Dechert if they
5 wish to be heard -- and Mr. Smith.

6 MR. BAKER: I think maybe anyone supporting the
7 objection might want to go next.

8 THE COURT: All right. It's a good suggestion, Mr.
9 Baker. All right. Anyone else who shares Mr. Leblanc's views
10 of the world?

11 MR. LEBLANC: Your Honor --

12 THE COURT: Well, let me --

13 MR. LEBLANC: -- just on this motion, I assume, Your
14 Honor, right?

15 THE COURT: Yes, just on this motion.

16 MR. LEBLANC: Thank you.

17 THE COURT: Maybe I'm going to improperly point to the
18 600 pound gorilla in the room. And I don't even know if it is
19 the 600 pound gorilla in the room but I'm going to ask the
20 question. There's an intercreditor agreement here. Are the
21 provisions of that intercreditor agreement in play here?

22 MR. BRILLIANT: We don't believe so, Your Honor. We
23 believe we have the right to object. As we pointed out to Your
24 Honor before, in connection with the --

25 THE COURT: I'm not talking about cash collateral now.

1 MR. BRILLIANT: Yeah, I understand.

2 THE COURT: I'm talking about --

3 MR. BRILLIANT: I understand, Your Honor.

4 THE COURT: -- I'm talking about to the --

5 MR. BRILLIANT: I understand, Your Honor.

6 THE COURT: Yeah.

7 MR. BRILLIANT: There is no --

8 THE COURT: You need to identify yourself for the
9 record. I'm sorry.

10 MR. BRILLIANT: Oh.

11 THE COURT: Just because I know you doesn't mean --

12 MR. BRILLIANT: Yes.

13 THE COURT: -- the recorder knows you.

14 MR. BRILLIANT: Your Honor, Alan Brilliant from
15 Dechert on behalf of Wilmington Trust, the administrative agent
16 for the second liens. Your Honor, with respect to the
17 intercreditor, there is no expressed provisions that prohibits
18 the second lien agent from objecting to a 363 sale. Now, at
19 this point in time, we're only talking about bid procedures.
20 We're not talking to the sale --

21 THE COURT: Right.

22 MR. BRILLIANT: -- itself. But there is no provision
23 in the intercreditor with the -- that expressly deals with
24 objecting to a 363 sale at all. Now, in the typical
25 intercreditor agreement and in the model ABA intercreditor

1 agreement, there is a provision with respect to 363 sales.
2 There is not one in this intercreditor agreement which, from
3 our perspective, means that we are free to object to a 363
4 sale. Again, what we're dealing with today is just the bid
5 procedures and not the sale.

6 THE COURT: Right.

7 MR. BRILLIANT: Now there are provisions, Your Honor,
8 in connection with the intercreditor which prohibit us from
9 taking any actions to object to or stay any actions that are
10 being taken by the first lien agent to --

11 THE COURT: Enforce --

12 MR. BRILLIANT: -- exercise --

13 THE COURT: Right. Exercise revenues.

14 MR. BRILLIANT: -- revenues against the assets. Now
15 we filed, as Your Honor is aware, an objection to cash
16 collateral on a cross-motion for adequate protection in
17 connection with this matter. And the debtors, quite properly,
18 said that the provision that we point in the agreement with
19 respect to the payment of fees, deals with the enforcement of
20 remedies by the parties. And they say that what's going on
21 now, a 363 sale by the debtors, is not an enforcement of
22 remedies by the first lien agent. And we agree with that. And
23 consequently, the only provisions in the intercreditor that
24 would prohibit us from objecting to a sale is if the first lien
25 agent were to be enforcing remedies which the debtors say they

1 are not and which we agree that the first lien agent at this
2 point is not. So we are not prohibited from objecting to a
3 sale. And again, whether or not there's an enforcement of
4 remedies, at this point in time, all we're dealing with is bid
5 procedures which is clearly not the enforcement of remedies.
6 And so, we feel that we are free to object to that. And we are
7 working on an objection and are hopeful that we will have
8 something filed by 4:00 if we're required to.

9 Now with the issue of discovery, Your Honor, I think
10 you know the frustration that we have had in connection with
11 this matter in getting discovery. And I think that it's our
12 opinion that what's happening here is the debtors jammed us in
13 connection with the adequate protection and the cash
14 collateral. They did not produce any discovery until after we
15 filed -- sought a hearing with Your Honor and had a telephone
16 conference with Your Honor. And Your Honor required them --
17 ordered them to produce documents. And at that time -- and
18 it's interesting because we're seeing the same fact pattern
19 being repeated here. What Your Honor did was order them to
20 produce on a rolling basis information over a holiday weekend
21 so that we could take a deposition on Sunday with the
22 expectation that if we couldn't work things out for a
23 continuance that there would be potentially a hearing on
24 Monday.

25 Now, leaving aside the whole issue of discovery with

1 the cash collateral, we were very cognizant of the fact that we
2 had another hearing scheduled on the 27th and that even if we
3 put it off, we were not going to be in a position to take
4 discovery this week while we had to file an objection on the
5 bid procedures. Presumably, we're going to have the
6 opportunity to review discovery from the debtors in connection
7 with the bid procedures, prepare witnesses, take depositions
8 and prepare for a hearing on Monday. That being said, Your
9 Honor -- and therefore, Your Honor, it was very important for
10 us that we get all the discovery in connection with the cash
11 collateral and the adequate protection issues done last week
12 regardless of whether or not we would be able to reach an
13 agreement with the first lien agent in connection with
14 continuing that hearing to some date past the hearing in
15 connection with the bid procedures.

16 We received some documents right before sundown on
17 Friday as required in connection with those few documents they
18 had agreed that were given to us. But rather than getting them
19 Friday morning or any time during the day, we got them just at
20 the close of business. And then we received no documents on
21 Saturday at all even though they agreed that there would be a
22 rolling production of documents. And then on Sunday, in the
23 middle of the afternoon, a few hours before the deposition, we
24 received another 150 pages worth of documents from the debtors.
25 We have still not -- we asked them to confirm that that is

1 everything that they agreed to produce in connection with the
2 discovery conference we had with Your Honor. We have not yet
3 received that. We have not received a privilege log. But the
4 bottom line is, their idea of rolling production is to give you
5 all the documents on the last day which is what's happening and
6 repeating itself again here. And we do believe, Your Honor --
7 when Mr. Leblanc said that this is the most important hearing
8 in the case, we do believe that that is true. The debtors want
9 to put this company on a path to be sold in a 363 sale outside
10 of a plan of reorganization on a very short period of time for
11 a price they say we don't have the money. Your Honor has seen
12 their chart. We've talked about it before. Even under their
13 analysis, we're sixteen million dollars out of the money in a
14 1.3 billion dollar sale when you take into account the
15 assumption of debt. We're only sixteen million dollars out of
16 the money assuming they get default interest and assuming
17 there's a thirty-seven million dollar purchase price adjustment
18 which are -- and assuming what the date is and we just think
19 are big assumptions. And what they want to do is burden the
20 estate with a thirty-five million dollar breakup fee next week
21 which is about ten percent of the 350 million dollars principal
22 amount of the second lien debt. So it's a very significant
23 amount of money and fees that would be paid -- fees that would
24 be paid even if subsequently a plan of reorganization were
25 confirmed and no sale occurred.

1 And we believe we have the right to explore whether or
2 not a 363 sale outside of plan of reorganization can be
3 confirmed in this case. And we believe that it can't be -- I
4 mean, that a sale cannot be approved in this case outside of a
5 plan. That is ultimately going to be the basis of this hearing
6 because if you can't approve the sale ultimately, there's no
7 reason to burden the estate with this large breakup fee. And
8 that's going to be what the hearing's about. And in order to
9 do that, we need to understand what their business
10 justification is. We need to understand -- get their
11 documents and depose their witnesses in a meaningful way. And
12 we're not being given the opportunity to do that.

13 THE COURT: Let me ask you a substantive question. Am
14 I reading the bid procedures correctly? And Mr. Baker can
15 chime in -- that not only is this a 363 sale but that it is
16 proposed that upon the closing, the proceeds go to the first
17 lien lenders.

18 MR. BRILLIANT: Well, all of it except for a small
19 amount --

20 THE COURT: Right.

21 MR. BRILLIANT: -- that would be escrowed for the ten
22 million dollar management incentive plan, if Your Honor would
23 approve it, and to pay fees for a liquidating plan. They
24 basically are giving all the money to the first lien lenders.
25 But then they want to spend, under their analysis, thirty-eight

1 million dollars to distribute some small amount of money to the
2 second lien as an unsecured which seems an absurd business
3 proposition.

4 But that's right, Your Honor. Other than escrowing a
5 small amount, it is, under their procedures, they would be
6 giving the money all to the first lien lenders.

7 And the other thing -- and you'll hear about this more
8 at the hearing. I don't expect that Your Honor wants
9 discussion or argument about the bid procedures. But --

10 THE COURT: No. But a preview is what I'm looking
11 for.

12 MR. BRILLIANT: But one of the things that's really
13 interesting about the bid procedures is they modify or take
14 away our right to credit bid as second lien lenders. If we
15 were to credit bid, we have to pay more than anybody else in
16 the case because they say that we have to basically fund the
17 liquidating plan just as the first lien lenders have agreed to
18 do which is, Your Honor, with all due respect, absurd, that
19 somebody who's already a party in the case who has lent the
20 debtor 350 million dollars, in order to exercise its rights,
21 has to fund expenses that they haven't agreed to and without
22 adequate protection or any rationale.

23 Your Honor, I think we've made it very clear what we
24 think has been going on. We're being jammed. They took away
25 the thirteen million dollars we were supposed to get. They

1 refuse to pay our fees. They refuse to give us documents on a
2 timely basis. And basically, Your Honor, what they're trying
3 to do is jam us and run over us. And a lot of that as Your
4 Honor has seen in their pleadings and in court -- you know,
5 threats that they're going to sue us for violating the
6 intercreditor. And, ultimately, Your Honor, we don't see that
7 they have any claims. That's all just a distraction in trying
8 to move things away from what's really going on here which is
9 that they've come up with a sale which provides the first
10 lenders', effectively, payment in full and they don't want
11 anyone to oppose it.

12 And you'll hear testimony, Your Honor, if we ever get
13 to do discovery and see the documents, that there's ulterior
14 motives. Not just the ten million dollars. I mean, that's
15 obvious from that. But there's ulterior motives for the
16 shareholders here in doing the sale. And before we talk to
17 Your Honor about them, we would like to test them in discovery
18 and make sure that what we believe is really going on here.
19 And why they need to do this this year is, in fact, the reason
20 that they're doing it.

21 THE COURT: All right. Thank you. Mr. Bryan?

22 MR. BRYAN: Your Honor, I'm David Bryan from Wachtell
23 Lipton for the first lien agent. I just rise to say that we
24 disagree with the second lien agent's position with respect to
25 standing. We do intend to raise standing as a basis for

1 disallowing any objection that they file to the bid procedures.
2 We'll fully brief that to Your Honor.

3 I would just note a couple of things. First of all,
4 they contend in their adequate protection brief that there has
5 been an exercise of remedies, and therefore the waterfall under
6 Section 4.1 of the intercreditor agreement -- and if they're
7 correct about that, Your Honor, then they are required to be
8 silent with respect to that exercise of remedies. That's going
9 to be in play with respect to the adequate protection motion --

10 THE COURT: Right. Can I --

11 MR. BRYAN: -- on October 5.

12 THE COURT: -- can I ask you to pause for a second.
13 Because there was another question that I need to ask both of
14 you. Because based on Mr. Leblanc's disclosure with respect to
15 his client's holdings, they have a substantial position in both
16 the first lien and the second lien. So in addition to the
17 intercreditor issue, there's the issue of whether it's going to
18 be either of your views that he shouldn't be allowed to speak
19 because the agent's the only one who's supposed to speak?

20 MR. BRYAN: I -- Your Honor, I bel --

21 THE COURT: So that's not a 600 pound gorilla, maybe
22 it's a 200 pound gorilla. But I just want to know who's all in
23 the room on this issue. I don't want to be surprised down the
24 road in any way. So I'm just trying to tease out all of these
25 issues that I think precede my ability to get to the merits,

1 so.

2 MR. BRYAN: Yes, I believe that will be an issue that
3 we will raise, that only the agent has standing.

4 I do have a question that requires further disclosure,
5 I believe, from the Milbank firm. He said -- Mr. Leblanc
6 represented that they're not consenting lenders and that
7 they're not bound by the sale support agreement. And I would
8 like you, Your Honor, please, to require a representation as to
9 whether any of the first lien debt that they've acquired was
10 subject to the sale support agreement. Because subsequent
11 purchasers are bound -- are required, in order to take transfer
12 of first lien claims, to sign an acknowledgement to be bound by
13 that. So I don't think the disclosure that Your Honor has is
14 complete on that subject.

15 THE COURT: All right.

16 MR. BRYAN: But we do have our standing problems that
17 we'll brief for you.

18 THE COURT: All right. Mr. Brilliant, are you -- you
19 can respond to that, Mr. Leblanc, but Mr. Brilliant, can I go
20 back to you for a moment and ask you your view of the question
21 of whether or not Mr. Leblanc gets to speak vis-a-vis your
22 client? He's in your group too.

23 MR. BRILLIANT: Yes, Your Honor. They're parties-in-
24 interest in this case. And they have a right to speak. We are
25 the administrative --

1 THE COURT: Agent.

2 MR. BRILLIANT: -- agent. It is secured debt. But
3 there's nothing that prohibits the second lien -- individual
4 second lien --

5 THE COURT: Okay.

6 MR. BRILLIANT: -- lenders from appearing in this case
7 and participating. There's nothing -- I don't believe there's
8 anything in the first lien credit agreement that does that
9 either. You know, under the Bankruptcy Code, under Section
10 1109, all parties-in-interest can --

11 THE COURT: All right.

12 MR. BRILLIANT: -- be heard. As for this issue, Your
13 Honor, that Mr. Bryan raised with respect to our cash
14 collateral cross motion, we were very clear in that. We did
15 not concede that they were exercising remedies. We just --

16 THE COURT: All right. We're --

17 MR. BRILLIANT: -- pointed out what the --

18 THE COURT: -- that's --

19 MR. BRILLIANT: -- waterfall was in the document.

20 THE COURT: -- that's a detour for the purposes of
21 right now. And with respect to your question about the
22 conditions pursuant to which his client's positions were
23 acquired, you two can discuss that without involving me, I
24 think.

25 MR. LEBLANC: Your Honor, that's fine. Andrew Leblanc

1 again. Do you want me to respond to the question of whether
2 the agent can preclude the principal from speaking or?

3 THE COURT: No, let him finish, and then you address
4 that.

5 MR. BRYAN: Your Honor, I do think it's important to
6 know whether, for purposes of your decision on this subject,
7 it's going to be important for the Milbank firm to disclose
8 whether their client's alleged holdings of second lien --
9 excuse me, of first lien debt, are or are not acquired from
10 holders. I don't mean to put the Court on the spot. But I,
11 right now, don't know that, and it's hard to brief that in a
12 vacuum.

13 MR. LEBLANC: Your Honor, let me just try to respond
14 to that this way. We'll certainly have discussions with the
15 first lien agent. We asked -- there's an ambiguity in the
16 document. I think the answer is no. Certainly our client's
17 holdings -- pre-petition holdings -- they didn't sign the sale
18 support agreement. They certainly have been in the
19 marketplace.

20 I don't know the answer to the question. I don't
21 believe they have. But there is an ambiguity in the document
22 as to whether, after-acquired debt taints the entirety of the
23 rest of your debt. We asked for clarification on that question
24 from the two parties that proposed -- that worked on that, and
25 they refused to give it to us. So I'm happy to discuss with

1 Wachtell the answer to their question, to the extent that it's
2 relevant, and I'm not sure that it is.

3 And if it is relevant, we may have to have another
4 discussion with the Court with respect to an interpretation of
5 the sale support agreement, because it's an ambiguity that we
6 don't think was -- we think the Court's going to need to
7 resolve it if somebody wants to assert that by buying some slug
8 of debt that's signed up to it, it taints the balance of it.

9 THE COURT: I got you.

10 MR. BRYAN: I think that's a serious issue --

11 THE COURT: I got you.

12 MR. BRYAN: -- that the Court would have to address if
13 it comes to that. And I just don't --

14 THE COURT: I'm not sure, based on what I've heard,
15 that it's going to come to that. But I'm just trying to, as I
16 said, tease out all of these issues that are embedded in the
17 credit documents that may have -- that parties may tell me next
18 week, have a bearing on whether or not I can consider the
19 objections that are being made.

20 So I'm going to reiterate what I said, which is to ask
21 you to talk to each other and attempt to work it out. And to
22 the extent that you don't, you're going to file more paper, so
23 you can tell me to what extent you think I need to resolve that
24 before I can get to the merits. Okay, so --

25 MR. BRYAN: Because to be clear, Your Honor, we don't

1 agree that there's an ambiguity. We think the language of the
2 sale support agreement is clear, that if you buy "slugs of
3 debt" that are subject to the sale support agreement, and you
4 provide the required agreement to be bound by the terms of that
5 document as a condition of buying the debt, I don't agree with
6 the word "taint", but you're bound. That's our position.

7 THE COURT: Right. Well, you know -- and again, this
8 is all -- we're doing this in real time, because Mr. Leblanc
9 just made his disclosures once we went on the record. But this
10 might all be academic inasmuch as he's got forty percent in the
11 second lien. Mr. Brilliant's not telling him he can't talk.
12 And I think he's also got a piece in the mez. So I think he's
13 here, and it's going to kind of be a question of what hat he
14 tells me he has on when he says what he says.

15 MR. BRYAN: Right. But, Your Honor, I think that that
16 will be a very serious standing point regardless, because,
17 again, if he's wearing the hat of a second lien lender, then --

18 THE COURT: Then you're into the intercreditor.

19 MR. BRYAN: -- he has an intercreditor agreement
20 standing problem. And if he's got a problem speaking as a
21 first lien lender, because he's bound by the sale support
22 agreement, then he's got a different standing problem. And I
23 just need to know the facts --

24 THE COURT: Right. Right.

25 MR. BRYAN: -- relevant to briefing.

1 THE COURT: And that's exactly why I asked all the
2 questions, because I wasn't sure that you all were going to
3 raise it. But I didn't want to be surprised. Okay. So I
4 distracted you. I'll let you get back to anything else you
5 were going to say.

6 MR. BRYAN: No. I rose solely to speak to the
7 standing point. Other than to tell Your Honor that we are
8 obviously gravely concerned with respect to -- I didn't hear
9 any specifics with respect to an adjournment. But the first
10 lien lenders are obviously gravely concerned with anything that
11 might jeopardize the drop-dead date on the sale, because, as
12 Your Honor is well aware from having read the documents,
13 Constellation could terminate the agreement and walk. And we
14 don't think that those terms -- we don't think that's a risk
15 that the first lien lenders' money should be gambled on.

16 So we just -- I guess that's the only other concern
17 that I rise to raise. But I'm getting ahead of the horse. I'm
18 putting -- as the cart here, I think.

19 THE COURT: All right.

20 MR. BRYAN: So I think I should turn to Mr. Baker
21 or/and the Latham firm.

22 THE COURT: All right. Let me hear from Mr. Baker,
23 Please.

24 MR. BRYAN: Thank you for --

25 THE COURT: I'm sorry, let me hear from Mr. Smith,

1 first.

2 MR. SMITH: Thank you, Your Honor. Attorney Bruce
3 Smith of the committee. Good afternoon, Your Honor. The
4 committee's position is that they would join with the concerns
5 of the second lien agent and CarVal and Fortress. There were a
6 number of issues. Your Honor can expect an objection to
7 numerous issues on the bid procedures which have already been
8 alluded to. We also share the concerns with regard to the 363
9 process as compared to a plan process. We also are somewhat
10 concerned with some of the motives of the sale process and the
11 rush to judgment in the case.

12 So that our concerns would be to slow the process down
13 and give us an opportunity to review much of this discovery,
14 which also, we are being inundated with, and to be able to
15 better understand what's going on, and our financial advisors
16 be able to do that.

17 THE COURT: All right.

18 MR. SMITH: Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Smith.

20 Okay, Mr. Baker. Can I ask, before you start, Mr.
21 Baker, is Constellation here?

22 MR. BAKER: Constellation is here.

23 THE COURT: How are you?

24 MR. NEIER: Hi.

25 THE COURT: We're old friends.

1 MR. BAKER: Your Honor, Jan Baker of Latham for the
2 debtors.

3 Judge, I think it's important for the Court to know
4 that in our opinion, virtually all of the production that's
5 been requested and that's in dispute related to the merits of
6 the sale and had little or nothing to do with the actual
7 bidding procedures.

8 THE COURT: You know, Mr. Baker, I have to stop you,
9 because I know that that's the position that was taken in the
10 papers. But I'm being told -- and I think there's substantial
11 merit to what I'm being told -- this is basically the whole
12 ball of wax. Not that I wouldn't have the ability to not
13 approve the sale after we got through the bid procedures; but
14 this is more than the usual bid procedures hearing where the
15 parties are really simply focused on the amount of the breakup
16 fee, the bidding increments, the timing, et cetera.

17 I think this is a fast-track -- which is what it is --
18 case, that's going to have enormous consequences for the
19 parties-in-interest, and that to approve the bid procedures and
20 to have the auction commence -- and the reason I asked whether
21 Constellation was here, is because I have a concern to not do
22 anything that prompts or sets the stage for Constellation to
23 leave. And I don't want to do anything or say anything that
24 prejudices the ability of an auction, were it to be approved,
25 to realize more value for the parties-in-interest in this case.

1 That being said, I think I can agree with your
2 statement in the pleading that was filed this morning, that
3 this is just -- well, you say something that's accurate but I
4 think there's more to it. You say a decision on the procedures
5 to govern the auction process is not a decision on the merits
6 of the sale itself. I agree with that. But it will create
7 substantial momentum in that direction. There will be an
8 approval of a breakup fee.

9 And we did have several hearings, some of them on the
10 record, some of them in the back room, where we discussed
11 production. And I think it's fair to say that I gave the
12 debtors every benefit of the doubt and every measure of leeway
13 that I thought was appropriate with respect to the production.
14 But I'm hearing a chorus of people who are telling me that it
15 hasn't gone as quickly as it might have, and we are barreling
16 toward a hearing on Monday in which I have a very serious
17 concern that the parties do not have adequate time to prepare
18 for what I think they appropriately view as perhaps the most
19 important hearing in the case.

20 MR. BAKER: Well, Your Honor, I certainly understand
21 the Court's comments. And if I could respond to them? There
22 have been serious allegations made in the pleadings and in some
23 of the comments today about improper motives that have infected
24 the sale, that the parties say -- the objecting parties say
25 raise very serious questions as to whether the sale should

1 occur.

2 I think the issue before the Court is, none of those
3 parties has proposed an alternative. None of them has stood up
4 and say, we understand that there's a real possibility the
5 debtors might run out of money in the first quarter of next
6 year, and if that happens, we're prepared to provide
7 subordinated DIP financing behind the first and second lien
8 lenders. So I think first the objecting parties, when you cut
9 to the chase, they want the debtors, they want the first lien
10 lenders, and they want the people who get the electric power,
11 to take the risk that this worst-case scenario might happen.

12 Now, if we had understood ourselves what the volume of
13 production was, I assure Your Honor, we would have done things
14 very differently. I don't think anybody on our team had any
15 idea that we were going to have to process twenty million
16 pages. It surprised us as much as it did our opponents today.
17 Once we realized it, we tried to put the resources on it to do
18 it. And I frankly think we did a good job.

19 In order to just quantify for the Court, you know,
20 even the 13,000 or so pages that have actually been produced
21 sounds like a stupendous number of documents. That's about
22 four boxes full of documents, Your Honor. I don't think that's
23 an insurmountable burden for firms with the resources that are
24 before the Court today. If we'd known it, I completely agree,
25 we would have done it sooner. We didn't.

1 I'm frankly sorry, even though we have applied the
2 rule in many other cases, and seen it approved in many other
3 cases, that there's no production unless and until someone
4 files an objection. I think if we'd known the brain damage
5 that that was going to cause here, we wouldn't have done it and
6 we're not going to do it again in this case.

7 But having said that, I think the issue is what really
8 is fair under the circumstances when the Court looks at where
9 we are and tries to balance the equities. Your Honor can
10 assume, even though I have a hundred percent confidence level
11 it's wrong, that we have bad motives and --

12 THE COURT: I don't assume you have bad motives.

13 MR. BAKER: -- no, no. But I'm just saying, for
14 purposes of hypothetical, that we have bad motives, we've acted
15 improperly, and that the depositions and the discovery during
16 the next month will abundantly prove that to be the case, and
17 that this Court should never consider and would not consider,
18 in that event, approving the sale. What seems to us, however,
19 to be the most dangerous and least attractive route is to say,
20 let's say the debtors screwed up on the discovery, they
21 underestimated -- even if in good faith -- how long it would
22 take, they didn't get the documents to them. Is the right
23 remedy to pass the October 4th deadline and put all of the
24 parties at risk of there not being a Constellation sale?

25 The downside, if the Court were to do that, is there

1 is absolutely liability for a breakup fee. It's actually not
2 thirty-five million dollars. The way the asset purchase
3 agreement works is, if the Court approves the bidding
4 procedures, we go forward to a sale, and Your Honor determines
5 for any reason not to approve that sale, then Constellation
6 is -- assuming it's the --

7 THE COURT: Right.

8 MR. BAKER: -- the stalking-horse bidder, is entitled
9 to fifty percent of the thirty million dollar breakup fee,
10 which is fifteen million dollars, and it's entitled to up to
11 five million dollars for its expense reimbursement. And in the
12 event we consummate an alternative transaction within the next
13 twelve months, they're entitled to the other half of their
14 breakup fee. So it's twenty million for sure, and fifteen
15 million possibly.

16 And parties may say it's outrageous that the estate
17 would be exposed to depleting its assets in the amount of
18 twenty million dollars. And frankly, I don't think anybody
19 likes that possibility, i.e., that Your Honor might conclude
20 any one of the really awful suggestions that have been made
21 about motives or background or timing or anything else proves
22 to be true, and concludes that the Court has no alternative but
23 to disapprove the sale. But I think --

24 THE COURT: Does that attach -- and this is not an
25 expression of a view on the merits at all -- but does that

1 alternative set of payments to Constellation apply in the event
2 that the bid procedures were to go forward but that the sale --
3 it's ultimately held that the sale has to be done through a
4 plan?

5 MR. BAKER: In other words, we went forward with the
6 auction. And when we got to the sale hearing, Your Honor
7 concluded you didn't want to approve it under a 363, but were
8 willing to approve it under a plan?

9 THE COURT: Willing to have it be considered for a --

10 MR. BAKER: Were willing to consider it under --

11 THE COURT: -- yes.

12 MR. BAKER: -- a plan, but not through a 363. I'm
13 going to ask Mr. Neier for an opinion on that, as
14 Constellation's lawyer.

15 THE COURT: Mr. Neier, good to see you again.

16 MR. NEIER: Good morning, Your Honor. I think it
17 depends whether the transaction approved under a plan is an
18 alternative transaction. So, if for some reason, Constellation
19 became a plan sponsor or something like that, there would not,
20 obviously, be an earning of a breakup fee. I think that's the
21 way it works.

22 MR. BAKER: That was my recollection, Your Honor. But
23 since I figured the person with the best --

24 THE COURT: Exactly.

25 MR. BAKER: -- knowledge in the room --

1 THE COURT: All right.

2 MR. BAKER: -- was likely to be Mr. Neier.

3 THE COURT: All right. Very well.

4 MR. BAKER: So --

5 THE COURT: So let's talk about what we should do.

6 MR. BAKER: Okay. Could I make one more comment --

7 THE COURT: Certainly.

8 MR. BAKER: -- just to close the loop on discovery? I
9 am sorry to report that we can envision no circumstances under
10 which twenty million pages or nineteen million, will be
11 produced. I'm told by Ms. Wheatley that all of the remaining
12 documents will continue to be produced on a rolling production.
13 That will conclude tomorrow. And she anticipates it will be
14 less than the total number of pages already produced.

15 THE COURT: I'm sorry. I just didn't follow what you
16 said.

17 MR. BAKER: We've produced about 13,000 pages --

18 THE COURT: Okay.

19 MR. BAKER: -- according to Mr. Leblanc, which I think
20 is approximately correct.

21 THE COURT: Okay.

22 MR. BAKER: Ms. Wheatley tells me that the rolling
23 production that is continuing will be completed tomorrow, and
24 that the total amount of remaining pages to be produced is some
25 number less than the 13,000 that's already been produced.

1 We're not --

2 THE COURT: So then --

3 MR. BAKER: -- sure --

4 THE COURT: -- the nineteen million have been reviewed
5 and determined that they're not responsive to the request? Is
6 that --

7 MR. BAKER: Yes --

8 THE COURT: -- the point?

9 MR. BAKER: -- Your Honor.

10 THE COURT: Okay.

11 MR. BAKER: So what actually happened was something
12 about a little less than a million pages ended up having to be
13 reviewed based upon the very broad search terms that were
14 requested by Milbank and Dechert. That million pages was
15 boiled down and has resulted in 13,000 page so far, and
16 something less than 13,000 projected yet to be produced. So it
17 could be a total of another 7,000, 10,000, but it's not going
18 to be nineteen million pages that are dropped on them.

19 THE COURT: Okay.

20 MR. BAKER: So we're saying there are four boxes to be
21 reviewed yesterday and today, and there are up to four boxes
22 remaining to be reviewed by Milbank and Dechert.

23 THE COURT: Okay. All right. Thank you, Mr. Baker.

24 All right, Mr. Leblanc or Mr. Brilliant, anyone else
25 want to --

1 MR. BRILLIANT: Your Honor, Allan Brilliant. I just
2 wanted to respond to one issue. And I guess I'd point out that
3 Mr. Neier is an old friend of mine as well.

4 THE COURT: He was -- let me be clear. Mr. Neier and
5 I are not old friends. He appeared before me in a matter
6 yesterday, and that's the basis of my banter with him. And
7 that's the sum total of it.

8 MR. BRILLIANT: Sure. Your Honor, I wasn't -- you
9 know. But in any event, Mr. Neier and I are old friends, and
10 I'm not impugning his integrity. But one thing I would point
11 out is I think he did give you potentially the right answer.
12 If ultimately Constellation acquires the assets through a plan
13 of reorganization, even if it occurs after November 16th or
14 even after the outside date, they wouldn't be entitled to a
15 breakup fee. I've no doubt that that's probably right.

16 THE COURT: Okay.

17 MR. BRILLIANT: But I think that's not the whole
18 answer. I think the whole answer to the question would be, if
19 Your Honor does not approve -- enter an order by, I think it's
20 November 16th or thereabouts, which is the last date, they have
21 the right to walk.

22 THE COURT: Right.

23 MR. BRILLIANT: And then if there's any other
24 transaction, an internal plan of reorganization, anyone else
25 becomes the bidder within a certain period of time --

1 THE COURT: Right.

2 MR. BRILLIANT: -- they would be entitled --

3 THE COURT: I got that.

4 MR. BRILLIANT: -- the thirty-five million dollars.

5 THE COURT: Right. Okay. All right, Mr. Leblanc,
6 anything else?

7 MR. LEBLANC: Briefly.

8 THE COURT: Uh-oh. Mr. Neier's getting up to tell you
9 that you're wrong.

10 MR. NEIER: I'm going to directly.

11 THE COURT: Okay.

12 MR. BAKER: Andrew Leblanc, Milbank Tweed, Your Honor.
13 I just want to address two points that were raised by Mr.
14 Baker.

15 The first is, I think he began to suggest that what we
16 haven't done is come in with an alternative transaction or
17 alternative proposal. I'm not sure that that is the standard
18 that will apply to the application of the motion. So I don't
19 think that that's a fair criticism.

20 I also think it's unfair for another pretty
21 substantial reason. They're not really engaged with us. We're
22 not -- we've tried -- that's one of our main complaints in this
23 is that a sales process was put in motion and then it was a
24 fait accompli at that point. And so I think it's important,
25 Your Honor. And there's two other elements that I think are

1 necessary for the Court to understand, and we'll raise these if
2 and when they -- it becomes relevant.

3 But we've sought to engage with bidders, people who
4 are in the industry, to have discussions with them about
5 alternatives. But everyone who was involved in the prior
6 process is covered by a nondisclosure agreement that they're
7 not willing to run afoul of. So it's -- we're cut out.

8 The debtor is also subject, pursuant to the pre-
9 petition APA to a no-shop provision until the bid procedures
10 are ordered. So trying to provide an alternative means two --
11 a group of creditors without interaction with anybody in the
12 industry, because there were a lot of people talked to in this
13 pre-petition process -- two creditors coming up with --
14 essentially writing a check, is what they're looking for.

15 There are ways to get to alternatives. And that's
16 what the plan process provides, is the opportunity to negotiate
17 towards an alternative, whether it's a third-party investing
18 funds, whether it is a sale -- maybe that's the right outcome.
19 But there are ways to get to alternatives. What they're doing
20 now, foreclosing third parties from speaking to us and
21 foreclosing themselves from talking to third parties, that's
22 not the way that one gets to alternatives.

23 So to the extent that that was the standard, we'd have
24 another issue here. But it really isn't the standard that the
25 Court's going to apply in considering the motion that's before

1 it when it does get heard.

2 Secondly, there's one point that I think can't be
3 missed. The only number we have from the debtors is a number
4 we got at about 8:37 this morning when we received a courtesy
5 copy of their objection, that they reviewed twenty million
6 pages. If they only reviewed a million pages, that's fine too,
7 and we don't have a problem with that, after application of the
8 search terms.

9 But if they're producing from that only 25,000 pages,
10 we're going to have a different set of issues to discuss with
11 them. Because 25,000 -- I'm a litigator by training. I spend
12 a lot of time in this courtroom. But 25,000 pages sounds like
13 an awful little production. It is about ten boxes of
14 documents. We may have an issue there. And that's one of the
15 purposes of getting documents when we asked for them, on
16 September 3rd, even if they'd begun on a rolling production.
17 Because there may be holes in this production, things that they
18 didn't look for. Because what -- one thing that needs to be
19 recognized, Your Honor, is that they've agreed to produce not
20 only for their clients, for the debtors, but also from their
21 investment banker's files, from their financial advisor's
22 files, from their law firm's files.

23 And so to the extent that the totality of the
24 documents comes in response to our requests -- and this is the
25 case, it's the whole ball of wax -- is 25,000 pages, we're

1 going to have a different set of issues that we will have to
2 bring in a motion to compel. And that too -- we're not saying,
3 Your Honor, that we want to push this to the brink of failing,
4 but we're entitled to have the bare minimum due process.

5 And we have been diligent in pursuing our discovery,
6 and we think that we're entitled to that before we have to
7 respond to the entire case.

8 THE COURT: All right. Mr. Bryan, one more time, and
9 then I'm going to tell you what I'd like you to do.

10 MR. BRYAN: Yes, Your Honor. And I'll be very brief,
11 because at some point, it does get to the merits rather than
12 procedure. But I just want the Court, in applying the equities
13 here with respect to this request for a stay -- there's been
14 sort of a suggestion that this was all -- this whole process is
15 coming as a surprise to the second lien holders. And around
16 10:30 at night, the second lien lenders turned to asking Mr.
17 Hunter, the CFO, a series of questions in his deposition.

18 I'm not going to read it the Court, but the essence of
19 the testimony, Your Honor, is that the Constellation sale
20 process was commenced as a result of a February meeting between
21 Fortress and other members of the steering committee and the
22 debtors and the Houlihan Lokey advisors and the Perella
23 advisors, and the debtors, in which they were asked -- the
24 debtors were asked to determine the value by commencing a sale
25 process. So the notion that there's --

1 THE COURT: All right.

2 MR. BRYAN: -- some surprise ambush going on here --

3 THE COURT: All right. You know what --

4 MR. BRYAN: -- Your Honor --

5 THE COURT: -- we're not -- I don't want to get into
6 he-said-she-said. I'm really not interested in this. Let
7 me -- here's what I want to do. All right? My recollection is
8 that we agreed to come back on October 5th for the continued
9 hearing on the adequate protection issues. Correct? Is that
10 correct?

11 MR. BAKER: That's right, Your Honor.

12 THE COURT: All right. All right. And that we agreed
13 to do it on the 5th and not the 4th, because I think Mr.
14 Rosenberg told me that there were issues pertaining to client
15 travel. And I see Mr. Rosenberg has joined us.

16 MR. ROSENBERG: That's correct, Your Honor.

17 THE COURT: All right. I've listened to what
18 everybody had to say today. And I have a concern that not only
19 is there an issue with respect to the parties having a
20 sufficient time to collect, review, digest, process, and take
21 depositions with respect to the documents, but I need more
22 paper. I think that there's not going to be a sufficient time
23 period between now and Monday, frankly, for the debtors to put
24 together an additional memorandum in support of the bid
25 procedures. There's a motion, but there's not a fulsome

1 discussion anticipating what the parties are going to say by
2 way of objection, which haven't even been filed yet. I'm going
3 to need to hear from the debtors why this should be approved.

4 We've gone through the -- I've gone through the APA.
5 I think everybody agrees that a fair reading of the APA -- and
6 Mr. Neier can tell me if I'm wrong -- is that the first
7 deadline is October 4th.

8 MR. NEIER: That's correct, Your Honor.

9 THE COURT: Correct?

10 MR. NEIER: Yes.

11 THE COURT: Even if -- so we're not putting anything
12 at risk if we were to come back here on October 4th and spend a
13 very full day trying this case, and if we had to, go over onto
14 the 5th. And I would ask Mr. Brilliant for his agreement that
15 we would briefly adjourn, subject to my calendar, the remaining
16 cash collateral issues --

17 MR. BRILLIANT: Agreed, Your Honor.

18 THE COURT: -- let me get everything out before
19 everyone tells me -- people tell me they don't like this. And
20 I'm guessing and hoping that Mr. Neier would tell me that if
21 for some reason we couldn't conclude on the 4th, and we went on
22 to the 5th, and I told you that I would rule in real time, that
23 Constellation would not walk away over a twenty-four hour
24 delay. That's my best way of accommodating all of the
25 conflicting concerns that I've heard here today.

1 MR. NEIER: Once again, David Neier on behalf of
2 Constellation. Your Honor, I don't have an answer for you. I
3 obviously will go to the client and make the parties aware as
4 to what their position is. Constellation wants the assets.
5 So --

6 THE COURT: I would imagine so.

7 MR. NEIER: -- so that's the good news, if you will.

8 THE COURT: Right.

9 MR. NEIER: The bad news is --

10 THE COURT: You're not going to hang around forever.
11 I understand that.

12 MR. NEIER: -- well, from Constellation's perspective,
13 there are a lot of problems with delay, the most important of
14 which is the fact that, as the debtors said in their first-day
15 affidavit, the natural gas prices work against them. And their
16 value --

17 THE COURT: I understand.

18 MR. NEIER: -- is declining.

19 THE COURT: Right.

20 MR. NEIER: And that value has declined
21 significantly -- significantly, since we signed the APA. And
22 it's continuing to decline. And it's expected to further
23 continue.

24 THE COURT: Understood.

25 MR. NEIER: So the problem --

1 THE COURT: But we're -- but if we started at 8:30 in
2 the morning --

3 MR. NEIER: Right.

4 THE COURT: -- on the 4th, and we finished at 11
5 o'clock, we have not breached the APA?

6 MR. NEIER: Absolutely not. And but more -- what I
7 was going to say is, it's really when the closing or the --

8 THE COURT: I'm not touching that date.

9 MR. NEIER: -- right.

10 THE COURT: And I think that because the marketing
11 process -- and let's assume for the moment that we go through
12 that exercise and I approve it -- because the marketing process
13 was so fulsome before we got here today, that taking a week
14 away from the auction period would not prejudice the situation,
15 because the parties are all out there. So I'm not at all
16 suggesting we touch the true outside date. What I'm merely
17 suggesting is that we push things back by a week, so that there
18 can be an organized process: briefing, depositions and a
19 trial, that determine what I view as probably the most
20 important -- not probably -- the most important issue in this
21 case.

22 MR. NEIER: Understood, Your Honor.

23 MR. BAKER: Your Honor, Jan Baker again for the
24 debtors. We agree with the Court's ruling. We think that --
25 we read the APA as saying that there is no question but that as

1 long as Your Honor rules at some point on the 4th, we're in
2 full compliance with the agreement. We think that the "subject
3 to the Court's calendar" language might even give us some
4 breathing room on the 5th. But I have -- were that to be
5 required, and I hope it's not -- I have great, great confidence
6 in Mr. Neier's powers of persuasiveness with Constellation.

7 THE COURT: All right.

8 MR. BAKER: I think if we do this, Your Honor, and we
9 agree it's a good resolution to the issues --

10 THE COURT: Okay.

11 MR. BAKER: -- before we leave the court today, we
12 should endeavor to have perfect clarity --

13 THE COURT: Yes we should, on --

14 MR. BAKER: -- on issues such as papers --

15 THE COURT: -- exactly.

16 MR. BAKER: -- are due to be filed from the parties.
17 We need to get those deadlines scheduled, get a cutoff for
18 depositions, so that everyone is on the same page and has a
19 common understanding.

20 THE COURT: All right. What's the most efficient way
21 to accomplish that? My instinct always is to let you try to
22 work it out among yourselves rather than having my impose them
23 on you. But I would ask you, because I think the papers are
24 going to be voluminous, and to the extent that there's going to
25 be a paper -- a pleading submitting on the standing issues and

1 anything else that you think is appropriate for me to look at,
2 that you -- that it not be 8:30 in the morning on the 4th. I'd
3 like to have the weekend to have every -- to have all of your
4 submissions for my review.

5 MR. BAKER: Yeah, we agree, Your Honor. And I think
6 that means some date --

7 THE COURT: All right. Well, why don't I leave it to
8 you. Unless -- Mr. Leblanc?

9 MR. LEBLANC: I'm fine with you leaving it to us, with
10 one caveat that I'd ask for the Court's indulgence. And that
11 is, if the Court could require the debtors to complete their
12 production --

13 THE COURT: I think we have a represent --

14 MR. LEBLANC: -- at some time --

15 THE COURT: -- we have a representation that that's
16 going to happen.

17 MR. BAKER: That is absolutely correct, Your Honor.
18 That's not an issue.

19 THE COURT: And when will that -- when will that
20 occur?

21 MR. BAKER: That'll be completed by the end of the day
22 tomorrow.

23 MR. LEBLANC: Okay.

24 THE COURT: All right?

25 MR. LEBLANC: Then I think we can work from there. As

1 long as that's --

2 THE COURT: Then I think you can work --

3 MR. LEBLANC: -- the representation.

4 THE COURT: -- from there with respect to depositions.

5 And we did have the issue as to Monday, that Mr. Rosenberg

6 raised. So I am, just to be clear -- we're talking about

7 Monday October 4th, right?

8 MR. BAKER: Yes, Your Honor. And that we've resolved
9 those issues.

10 THE COURT: Thank you. Okay.

11 MR. BAKER: I would -- I think we can work out
12 depositions, Your Honor. I would suggest, since everybody's
13 here today, and Your Honor has expressed a desire to have all
14 of the submissions prior to the weekend, we probably should
15 just ask Your Honor to set a deadline for the objecting parties
16 to file their pleadings the prior week, and then a period for
17 the debtors and the first lien lenders to respond. All --

18 THE COURT: All right. So --

19 MR. BAKER: -- to be to you by Friday.

20 THE COURT: -- all right. So production's going to be
21 complete --

22 MR. BAKER: Tomorrow.

23 THE COURT: -- tomorrow. Tomorrow is the -- is
24 Thursday.

25 MR. BAKER: Excuse me, Your Honor. We also need a

1 deadline for their document production as well.

2 THE COURT: Well, why do I think you're going to tell
3 me that you're going to object to having to produce documents?

4 MR. LEBLANC: Well, we are going to object. We
5 also -- I mean, in fairness, Your Honor, we honestly haven't
6 had a chance to even discuss it with our clients. We got them
7 at 7:15 last night was the first request for production of
8 documents propounded on us. So I -- we haven't had a chance.

9 But I am certain that we are not a movant on this. We
10 will produce documents to the extent that we're calling
11 witnesses, which I don't believe we are. That we are not -- I
12 know that the second lien agent has identified witnesses. And
13 to the extent we're using documents at the hearing, we would
14 obviously make those available --

15 THE COURT: Right.

16 MR. LEBLANC: -- but we're not a movant in this. So
17 you should expect that we will object to the production,
18 generally, of documents.

19 Now, Your Honor, I would make a proposal on the
20 objection deadline. I think -- understanding that I think
21 depositions are going to cross this date, and I haven't
22 consulted with Mr. Brilliant -- I think if we had till Tuesday
23 of next week, if we get the documents by tomorrow, that
24 probably --

25 THE COURT: Right.

1 MR. LEBLANC: -- would be sufficient.

2 THE COURT: Tuesday was what I thought -- Tuesday
3 makes sense.

4 MR. LEBLANC: Tuesday, Friday.

5 THE COURT: And then end of the day on Friday for
6 anything that the debtors and the first lien agent wants to put
7 in.

8 MR. LEBLANC: Now, the one -- with the one caveat,
9 Your Honor, that I expect, if we get the documents by the end
10 of the day tomorrow, we probably will begin depositions Monday.
11 And so our objection will not contain all of the --

12 THE COURT: And --

13 MR. LEBLANC: -- excerpts of the depositions --

14 THE COURT: -- right.

15 MR. LEBLANC: -- you would otherwise expect.

16 THE COURT: But you can supplement it as the
17 depositions unfold.

18 MR. LEBLANC: Right. And we would endeavor to
19 supplement before Friday --

20 THE COURT: All right.

21 MR. LEBLANC: -- so it's useful to the Court.

22 THE COURT: All right. And I'm just going to ask
23 you -- but I think you would do so anyway -- to be transparent
24 with each other as to witnesses that you're going to call,
25 documents that you're going to put into evidence and the like.

1 MR. LEBLANC: We certainly will be, Your honor.

2 MR. BAKER: And we've already -- we've already
3 disclosed to all of the parties the witnesses that we expect to
4 call.

5 THE COURT: All right.

6 MR. BAKER: And we had times proposed over the
7 weekend. We'll just shift that to this coming week.

8 THE COURT: All right. So I'm going to let the record
9 of this hearing stand as an order with respect to the emergency
10 motion and not separately enter any other order. And I will
11 tell you that to the extent that you hit speed bumps as this
12 process unfolds in the next ten days, don't hesitate to call my
13 chambers and we'll be available to assist you.

14 MR. BAKER: Thank you, Your Honor.

15 MR. LEBLANC: Thank you.

16 MR. ROSENBERG: Your Honor, could you just clarify the
17 time on Monday?

18 THE COURT: The time on Monday?

19 MR. ROSENBERG: Yes.

20 THE COURT: The time on Monday. How early can I make
21 you come?

22 MR. BAKER: As early as you like, Judge.

23 THE COURT: 8:30 in the morning. 8:30 in the morning?

24 MR. BAKER: Fine.

25 THE COURT: All right. And we'll go till as long as

1 it takes

2 MR. BAKER: And Your Honor, there were -- as a
3 housekeeping matter, there were several other unrelated matters
4 set for the morning of the 27th. I think all relating to
5 retentions. Do you want to go forward with those?

6 THE COURT: We'll go forward with whatever's
7 uncontested. To the extent that they are contested, let's kick
8 them over and let's talk about what we should do about the 5th.

9 MR. BRILLIANT: That's right, Your Honor. As much as
10 we would like to go forward and get the additional adequate
11 protection hearing over with, because as Your Honor knows, it's
12 very important to our clients.

13 THE COURT: Right. Of course.

14 MR. BRILLIANT: I think as a practical matter --

15 THE COURT: Right.

16 MR. BRILLIANT: -- it's going to be impossible for us
17 to prepare for a hearing --

18 THE COURT: Agreed.

19 MR. BRILLIANT: -- and also prepare for another trial
20 for the second day. So we would ask that if it's okay with
21 Your Honor that we'll confer with the debtors and --

22 THE COURT: Please.

23 MR. BRILLIANT: -- and your clerks and we'll come up
24 with --

25 THE COURT: Excellent.

1 MR. BRILLIANT: -- with another date.

2 THE COURT: And your rights are fully reserved under
3 the cash collateral order that I'm going to enter today. So I
4 appreciate that flexibility on your part.

5 MR. BRILLIANT: Thank you, Your Honor.

6 THE COURT: I think we're done.

7 MR. BAKER: Thank you, Your Honor.

8 THE COURT: All right.

9 MR. YOUNG: May I ask a question, Your Honor?

10 THE COURT: Yes.

11 MR. YOUNG: Bennett Young, Dewey LeBoeuf. I just want
12 to clarify that under the Court's order, the deadline for all
13 parties to object to the bid procedures is continued from today
14 to next Tuesday?

15 THE COURT: To next Tuesday. Correct.

16 MR. YOUNG: Thank you, Your Honor.

17 THE COURT: All right. Thank you, folks. We're
18 adjourned.

19 (Whereupon these proceedings were concluded at 12:50 p.m.)
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I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Debtors' insurance motion granted	13	4
Debtors' motion to pay pre-petition taxes	13	14
approved		
Debtors' wage motion approved	13	24
Debtors' critical vendor motion granted	14	12
Debtors' warehousing motion granted	14	18
Debtors' motion to employ professionals in the	15	3
ordinary course of business approved		
Debtors' motion to establish interim monthly	15	15
compensation procedures for the professionals		
in the case granted		
Debtors' bar date motion approved	17	1
Debtors' motion to establish procedures to	17	24
settle terminated safe harbor contracts approved		
Stipulation between Algonquin Gas Transmission,	19	17
LLC and the debtors approved		
Debtors' motion to reject certain executory	19	21
contracts approved		

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I N D E X, cont'd

R U L I N G S

DESCRIPTION	PAGE	LINE
Assumption of certain contracts with	20	25
Distrigas, Sequent, Credit Suisse and		
Sempra Energy approved		
Final form of the cash collateral order entered	21	18

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB (CET**D-486)
AAERT Electronic Certified Transcriber

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Date: September 24, 2010